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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re RICHARD ALAN LONDON, on Habeas Corpus.	A147314

In 1978, retired Presiding Justice Daniel M. Hanlon, then a Judge of the San Francisco Superior Court, presided at the trial at which a jury found Richard Alan London guilty of two counts of first degree murder and one count of being a past-convicted felon in possession of a firearm. Sixteen months was added to London's sentence after he admitted a criminal charge of possessing marijuana in prison in 1996.

In April 2014, the Board of Parole Hearings (Board) declined to set a date for London's release from state prison. The Board had before it a Comprehensive Risk Assessment by a psychologist who concluded: "Mr. London represents a moderate or average risk of violence. . . . While incarcerated, he has received a variety of RVRs [Rule Violation Reviews] . . . , including a 2011 RVR for Conspiracy to Introduce a Controlled Substance for Purpose of Distribution. The 2011 RVR does not represent Mr. London's first time being found guilty of involvement in such activity (as he received a 1996 RVR for Trafficking Possession of Drugs, for example). The 2011 RVR suggests that while he has decreased his impulsivity over the years, he has remained criminally oriented in his willingness to engage in antisocial forms of behavior, and his insight into the factors that have continued to motivate him in this manner appears to be lacking . . . . Furthermore, he has also established what is now a long-term pattern of attempting to

discredit those who have provided negative information about him . . . that suggests an underlying hostility towards those he deems a threat, and he appears to lack insight into this issue as well."

In the course of announcing the Board's decision, the presiding commissioner stated: "[W]e find you do pose a current unreasonable risk of danger to society, threat to public safety, and you're not eligible for parole. . . . You know, Mr. London . . . . [I]f I had any thoughts of letting you out, your closing statement at the end convinced me that that absolutely was the wrong decision. Your face was red. You were waving your arms. You were blaming the District Attorney for things that she merely was talking about, as far as what information that she had. You didn't focus on why you were suitable. You spent your closing argument attacking the District Attorney. I have never seen a person support a Risk Assessment more than your actions today. And I'm not talking current. I'm talking now, today, in this hearing. . . . Well, you're definitely not insightful because we watched it play itself out in front of everyone here in this room. You attack those that you consider a threat, and that makes you dangerous. . . . And I must have heard you say uncountable times how honest you are. I don't believe you. I don't believe you at all. . . . Your actions are inconsistent with what you claim to be the truth."

The other commissioner told the presiding commissioner, "I concur entirely in what you said. . . . I've never seen anyone fall apart during their closing as bad as you." "I think you're still a risk if we were to let you out at this point."

The presiding commissioner advised London: "You are currently an unreasonable risk of danger to society just based on your attitude and the other factors that we mentioned today. . . . We ended up at a five-year denial. . . . I will tell you, until you learn to recognize those internal factors that you have, you really have to see what we saw when you were giving your little tirade at the end. Your arms were moving around. Your face was red. Your voice was elevated. You were leaning forward. You were angry. You kept on looking over at the DA. Your behavior was 100 percent inappropriate for a parole hearing. I don't think I've ever, and I've been doing this for a

long time, ever seen anybody decompress like that . . . . You got a lot of work to do, Mr. London."

More than 17 months later, in September 2015, London filed a petition for a writ of habeas corpus asking the San Francisco Superior Court to vacate the Board's decision. The Honorable Bruce Chan issued a thoughtful and thorough explanation of his reasons for denying the petition. With minor, nonsubstantive editorial changes, we quote the relevant portions of Judge Chan's opinion:

"Standard of Review

"The Board 'shall normally set a parole release date' one year prior to an inmate's minimum eligible parole release date (MEPD). (Penal Code § 3041(a)). Before the Board sets a release date, however, it must determine whether the inmate poses an unreasonable risk to society. (Penal Code § 3041; Regs. tit 15 § 2402; *In re Dannenberg* (2005) 34 Cal.4th 1061, 1086.)

"In determining whether an inmate poses an unreasonable risk to society, the Board must consider all relevant information, including the inmate's social history, criminal record, the commitment offense itself, the inmate's behavior after incarceration, and the inmate's parole plans. (Regs. tit. 15 § 2402.) The due process clause requires that a factual basis of a decision by the Board denying parole must be premised upon some evidence relevant to the factors the Board is required to consider. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 663.)

"Factors tending to show a prisoner is unsuitable for parole include '(1) a commitment offense carried out in an "especially heinous, atrocious or cruel manner"; (2) a "[p]revious [r]ecord of [v]iolence"; (3) "a history of unstable or tumultuous relationships with others"; (4) "[s]adistic [s]exual [o]ffenses"; (5) "a lengthy history of severe mental problems related to the offense"; (6) "[t]he prisoner has engaged in serious misconduct in prison or jail." (Regs., § 2281, subd. (c)(1)-(6).) Further, the Board should look at 'the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel.' (Regs., [tit. 15,] § 2281, subd. (c); *In re Lawrence* (2008) 44 Cal.4th 1181, 1202 fn. 7).

"Factors tending to show a prisoner is suitable for parole include stable relationships with others, signs of remorse, the lack of any significant history of violent crime, realistic plans for release or development of marketable skills, and institutional activities that indicate an enhanced ability to function within the law upon release. (Regs., tit. 15 § 2402(d).)

"The question before the reviewing court is whether there exists some evidence to indicate that the release of a parolee will unreasonably endanger public safety. (*In re Lee* (2006) 143 Cal.App.4th 1400, 1408.) The Board's discretion in parole matters has been described as 'great' and 'almost unlimited.' (*Rosenkrantz, supra*, 29 Cal.4th at 655.) The precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Board, the decision must reflect [an] individualized consideration of specified criteria and cannot be arbitrary and capricious. (*In re Van Houten* (2004) 116 Cal.App.4th 339, 348.) As long as the Board's decision reflects due consideration of the specified factors, as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports it. (*Rosenkrantz, supra*, 29 Cal.4th at 677.)

"The Board must grant parole unless it makes a determination that public safety requires a lengthier period of incarceration because of the gravity of the offense of the underlying conviction. ([*Rosenkrantz, supra*, 29 Cal.4th] at 654.) [¶] . . . [¶]

"The Board Provided Some Evidence of Current Dangerous[ness]

"Petitioner challenges the factors reviewed by the Board in determining him unsuitable for parole. As the Board specifically did not re1y on his commitment offense, the Board's focus on petitioner's incarceration history and behavior at the hearing provide some evidence of his current dangerousness. Further, petitioner refers to *Lawrence* factors, which are irrelevant because the Board did not rely on his commitment offense.

"The Court [of Appeal] found 'a denial of parole is appropriate when there is an unreasonable risk that the prisoner, if paroled will commit antisocial acts.' (*In re Reed*

(2009) 171 Cal.App.4th 1071, 1081-1082.) When reviewing any unsuitability factors based upon an immutable factor, like prior criminal history, the Board must demonstrate that those facts support the ultimate conclusion 'that the inmate continues to pose an unreasonable risk of [danger] if released on parole.' ([(*In re*] *Criscione* [(2009)] 180 Cal.App.4th [1446,] 1459 citing *Lawrence, supra,* 44 Cal.4th at p. 1221.) '[T]he unexceptional nature of the commitment offense will not inevitably reflect a *lack* of current dangerousness without due consideration of the inmate's postconviction actions and progress towards rehabilitation.' (*Lawrence*, *supra*, 44 Cal.4th at p. 1218.)

"Although the Board did not rely on the commitment offense in denying petitioner parole, it did note specifically that petitioner has not gained the requisite insight into his criminal behavior and criminal mindset. Numerous courts have recognized that an inmate's minimization of his or her conduct can be a significant predictor of his or her future behavior. [Citations.]

"The Board noted that petitioner's unstable social history was demonstrated in his involvement in gangs prior to and in the beginning of incarceration and institutional misconduct as recently as 2011. The Board highlighted petitioner's behavior during the hearing and compared it with the psychological report, which specifically noted that petitioner discredits those who identify negative information regarding petitioner. Petitioner engaged in criminal behavior as recently [as] 20l1, his most recent . . . for operating a private store within the prison. The Board concluded that petitioner has neither taken appropriate steps to understand his criminal mindset nor taken responsibility for his criminal behavior. While the life crime is immutable and the Board found it relatively insignificant for the denial of parole, the Board highlighted petitioner's lack of insight and credibility throughout the hearing, as well as his anger, during the hearing as probative on the issue of current dangerousness. This is some evidence sufficient to support the denial of parole."

Hoping for a different result, petitioner filed a new habeas petition with this court, in January 2016. We issued an order to show cause, and appointed counsel, who filed a supplemental petition. We now have the Attorney General's return, and petitioner's

traverse. Although the Attorney General presents a persuasive argument that London's unexplained delay in challenging the Board's decision should bar him from relief (cf. *In re Clark* (1993) 5 Cal.4th 750, 765), we decline to base our decision on that procedural ground.

"When reviewing a parole unsuitability determination by the Board . . . , a court must consider the whole record in the light most favorable to the determination before it, to determine whether it discloses some evidence—a modicum of evidence—supporting the determination that the inmate would pose a danger to the public if released on parole. [Citations.] The court may not . . . substitute its own credibility determination for that of the parole authority. [Citations.] Any relevant evidence that supports the parole authority's determination is sufficient to satisfy the 'some evidence' standard." (*In re Shaputis* (2011) 53 Cal.4th 192, 214.)

" 'Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of [the Board . . .] . . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of [the Board . . .] . . . . It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the . . . decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the . . . decision.' " (*In re Shaputis*, *supra*, 53 Cal.4th 192, 210; accord, *In re Zepeda* (2006) 141 Cal.App.4th 1493, 1498 ["some evidence" is " '*any evidence in the record* that could support the conclusion reached' "], 1499 [quantum of evidence needed to satisfy "some evidence" test may be " 'meager' "]; see *In re Powell* (1988) 45 Cal.3d 894, 904 [some evidence test satisfied if parole authority did not act " 'without information, fraudulently, or on mere personal caprice' "].) This is why we have characterized the some evidence standard as "ultralenient." (*In re Morganti* (2012) 204 Cal.App.4th 904, 907.)

The psychologist concluded that London was a moderate risk of reoffending if paroled. That conclusion in the written report is itself "some evidence." So is the psychologist's conclusion that London "remain[s] criminally oriented in his willingness to engage in antisocial forms of behavior," as well as displaying "hostility" to those who oppose or frustrate him. London virtually vindicated these predictions at the hearing before the Board. (See Commissioner Pecks's remark: "You attack those that you consider a threat, and that makes you dangerous.") London's inability to control his emotions, in a setting where it was in his self-interest to do so, was fatal to his claim that he had insight into his anger. His "tirade" before the Board was even more lethal to his professed ability to resist provocation if released. His conduct is additional "some evidence." And, contrary to London's argument, it is hard to imagine evidence which could be more "relevant and reliable" proof "of current dangerousness" than the hostile and aggressive behavior the Board had just observed moments before making its decision.

The Board's reliance on this latter consideration is conclusive proof that the Board was making a determination individualized to London, a determination based upon, in Judge Chan's phrasing, "some evidence relevant to the factors the Board is required to consider." (*In re Shaputis*, *supra*, 53 Cal.4th 192, 210.) Moreover, we note that the Board's categorical disbelief of London is tantamount to discounting the evidence favorable to him in toto. With due regard for the Board's wide discretion, this record presents no basis for overturning the Board's decision as lacking the requisite evidentiary support. But London has an additional argument which he hopes will establish that the Board's decision is lacking legal support.

London's offenses were committed in 1975, so he was sentenced to concurrent sentences under the former indeterminate sentencing scheme. He contends his "adjusted base term of fifteen years reflects his culpability for the crime, yet he has served well over double that amount. Parole denial means London will serve 41 years," making him the victim of "a disproportionate [and] excessive sentence" that is violative of the California Constitution's ban on cruel or unusual punishment. However, as the Supreme

Court, and this court, have made clear, parole release of indeterminate life inmates is premised upon the inmate being deemed suitable for release. (See *In re Dannenberg*, *supra*, 34 Cal.4th 1061, 1081–1083; *In re Butler* (2015) 236 Cal.App.4th 1222, 1234–1235.) And we stressed that the base and adjusted base terms represent only "an approximation of the punishment the Board deems proportionate to the particular prisoner's offense," but neither "necessarily represent[s] the maximum punishment that may constitutionally be imposed on a prisoner." (*In re Butler*, *supra*, at pp. 1243, 1235.) Thus, we cannot agree with London's implicit premise that the mere number of years of incarceration is dispositive.

London insists that he was the shooter in only one of the two killings. Even assuming this version is true, it accepts that London was certainly present at the other killing and complicit to it.[1] Thus, it is disingenuous for London to speak of "the crime" when he was convicted of two first degree murders. And his behavior during his long incarceration has hardly been uniformly positive. He concedes that only in 1992 did he drop the pose of complete innocence and admit any involvement in the killings. He does not dispute that four years later he suffered another conviction for criminal behavior in prison. Although he disputes some details and inferences, London acknowledges he was still breaking prison rules in 2009 and 2011. And we have just upheld the Board's conclusion that his release poses a danger to public safety. No constitutional violation is shown by these circumstances. We therefore reject his claim that "as [he] has already served a disproportionate sentence, he must be released," relief which in any event we could not order. (See *In re Prather* (2010) 50 Cal.4th 238, 258.)

The petition is denied.

[1] The opinion of Division One affirming London's conviction establishes that the killings were simultaneous. It also notes that London, "a former state prison inmate then on parole, was wanted by the Department of Corrections for parole violations." (*People v. London* (July 28, 1980, 1 Crim. No. 18899) [nonpub. opn.].)

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Richman, Acting P.J.

We concur:

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Stewart, J.

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Miller, J.

A147314; *In re Richard London on HC*